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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

WELLS FARGO BANK, N.A., Plaintiff and Respondent, v. VINCENT FLAHERTY, Defendant and Appellant.	B228915 (Los Angeles County Super. Ct. No. BC406822)

APPEAL from a judgment of the Superior Court of Los Angeles County Mark V. Mooney, Judge. Affirmed.

Vincent Flaherty, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Vincent Flaherty appeals from the trial court's order denying his motion for relief from default and default judgment, as well as the order denying his motion for reconsideration, on the ground he was not properly served with the complaint filed by Wells Fargo Bank, N.A. (Wells Fargo). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

This action arises from Wells Fargo's acceleration of Flaherty's obligation on an equity line of credit the bank had issued before the collapse of the housing market. The $1.5 million line of credit was secured by two deeds of trust on Flaherty's home, which were junior in position to the deed of trust securing an adjustable rate home loan he had obtained from Bank of America. In December 2007 Flaherty's monthly payment on the Bank of America loan increased from $16,000 to $27,000. Due to this increase Flaherty had difficulty making payments on the line of credit, and numerous checks drawn on his Wells Fargo checking account were returned for insufficient funds. Although Flaherty attempted to renegotiate the terms of the line of credit and claims he was never in breach of his agreement with the bank, Wells Fargo cancelled the line of credit, seized the funds in Flaherty's account and on January 30, 2009 filed a complaint seeking judgment on the deficiency owed. Proof of personal service of the complaint was filed on March 4, 2009, and Flaherty's default was entered on May 27, 2009. A default judgment in the amount of $1,856,138.27 was entered on August 11, 2009.

Flaherty claims he first learned of the judgment when he was served by mail with a writ of execution from the Los Angeles County Sheriff on February 8, 2010. Representing himself, on February 11, 2010 Flaherty moved to set aside the default and default judgment. The motion was heard on May 21, 2010. The court pointed out Flaherty had failed to file a proposed responsive pleading required for relief from default.

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[1] Flaherty has failed to provide us with copies of the complaint or documents filed by Wells Fargo in support of the default judgment. We base our account of the facts on statements contained in Flaherty's opening brief, the transcripts of the hearings and the cross-complaint he attempted to file in the superior court at the time of his motion for reconsideration.

(See Code of Civ. Proc. §§ 473, subd. (b), 473.5, subd. (b)).[2] When Flaherty stated he did not know of the requirement, the court additionally advised him the declaration submitted in support of the motion was inadequate to support the relief requested.[3] Flaherty told the court he had finally contacted the person who claimed to have served him but the process server had been unwilling to provide him with a declaration. According to Flaherty, the process server had accurately described Flaherty's house but claimed to have served a man in his 30's, while Flaherty was "over 60 years old." The court rejected Flaherty's attempted explanation as hearsay and denied the motion, noting Flaherty's "long history of . . . saying you didn't get things or didn't receive things. And your motion is procedurally defective . . . ."

On May 28, 2010 Flaherty filed a motion for reconsideration of the motion to set aside the default, attaching both an expanded declaration recounting his telephone conversation with the process server and a draft cross-complaint. The motion was set for hearing on September 13, 2010. On September 10, 2010 Flaherty filed an ex parte application to postpone the hearing due to a conflicting federal court hearing and requesting leave to file a copy of the voice message left by the process server on Flaherty's answering machine. According to Flaherty, the message had been discovered after the previous hearing and was thus newly discovered evidence within the meaning of section 1008. The court granted the ex parte application and continued the hearing to September 17, 2010. After the hearing the court took the motion under submission. In a minute order dated September 20, 2010 the court denied the motion for three reasons: (1) the motion was improper under section 1008 for failure to present new facts; (2) the

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[2] Statutory references are to the Code of Civil Procedure unless otherwise indicated.

[3] In his declaration Flaherty stated "[t]he first recollection I have of this lawsuit" was his receipt of the writ of execution and that he "travel[s] frequently" and his mail is often "inadvertently" delivered to his ex-wife's address, "resulting in me receiving mail late, or not at all." He further stated he had been unable to contact the person who had purportedly served him, but "I do know for certain that no one ever served me, and that no one ever contacted me, by phone or mail, or otherwise, about the lawsuit."

motion was not supported by admissible evidence; and (3) the draft cross-complaint did not constitute a proposed responsive pleading under section 473.5, subdivision (b).

DISCUSSION

Generally, a motion to vacate a default and set aside a judgment "'"is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse . . . the exercise of that discretion will not be disturbed on appeal."' [Citations.] The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249; accord, *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496.) "Although a trial court has discretion to vacate the entry of a default or subsequent judgment, this discretion may be exercised only after the party seeking relief has shown that there is a proper ground for relief, and that the party has raised that ground in a procedurally proper manner, within any applicable time limits." (*Cruz,* at p. 495; see generally Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2011) ¶ 5:276 et seq., p. 5-67 et seq. [describing various grounds, procedures and time limits applicable to seeking relief from default].) "The proper procedure and time limits vary, depending on the asserted ground for relief." (*Cruz,* at p. 495.)

Flaherty contends he is entitled to relief from default because he was never served with the complaint. (See *Caldwell v. Coppola* (1990) 219 Cal.App.3d 859, 863 ["Proper service is a requirement for a court's exercise of personal jurisdiction. [Citation.] An order entered without personal jurisdiction over the defendant is void."].) A party who has not actually been served with a summons may seek relief from default under section 473, subdivision (d) (see *Ellard v. Conway* (2001) 94 Cal.App.4th 540, 544 ["[u]nder section 473, subdivision (d), the court may set aside a default judgment which is valid on its face, but void, as a matter of law, due to improper service"]) or section 473.5, subdivision (c) (*Ellard,* at p. 547 [§ 473.5, subd. (c), allows court to set aside default judgment if defendant's lack of actual notice "was not caused by the defendant's avoidance of service or inexcusable neglect"]) or by demonstrating the existence of

extrinsic fraud or mistake, such as falsified proof of service. (See generally *Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 180-181.)[4]

As the trial court concluded, Flaherty did not establish his entitlement to relief on any of these bases. Under section 473, subdivision (d),[5] Flaherty is not entitled to relief unless he was able to demonstrate the judgment was actually void for lack of proper service, a question we review de novo. (See *Cruz v. Fagor America, Inc., supra,* 146 Cal.App.4th at pp. 495-496.) Here, the filing of a proof of personal service meeting the statutory standards under section 417.10 created a rebuttable presumption that service was proper. (See *Dill v. Berquist Const. Co.* (1994) 24 Cal.App.4th 1426, 1441-1442.) Flaherty's failure to present competent evidence that he had not actually been served as indicated in the proof of service compelled the conclusion the judgment was not void. (See *Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 859 (*Sakaguchi*).)

Flaherty was also not entitled to seek relief from default under section 473.5.[6] As the trial court noted, Flaherty did not comply with subdivision (b) of this section because he did not submit a proposed responsive pleading with his motion. Flaherty argues his

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[4] Discretionary relief under section 473, subdivision (b), was not available to Flaherty because he did not file his motion within six months from the entry of judgment. (See *Rutan v. Summit Sports, Inc.* (1985) 173 Cal.App.3d 965, 970.)

[5] Section 473, subdivision (d), provides that the court "may, on motion of either party after notice to the other party, set aside any void judgment or order."

[6] Section 473.5 provides: "(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. . . . [¶] (b) A notice of motion to set aside a default or default judgment and for leave to defend the action . . . shall be accompanied by an affidavit showing under oath that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect. The party shall serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action. [¶] (c) Upon a finding by the court . . . that [the moving party's] lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action."

failure to file a responsive pleading should be excused because he is not a lawyer. We recognize, as a practical matter, a self-represented litigant's understanding of procedural rules is more limited than an experienced attorney. Whenever possible, we do not strictly apply technical rules of procedure in a manner that deprives litigants of a hearing. However, Flaherty's professed lack of knowledge of the law, standing alone, cannot excuse his failure to comply with an express statutory requirement imposed by the Legislature as a precondition to the relief he sought. (See *Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147-1149; see generally *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985 (*Rappelyea*).)

Moreover, Flaherty's failure to submit competent evidence (other than his own ambiguous statements) provided no basis for the required finding his failure to defend the action "was not caused by his or her avoidance of service or inexcusable neglect." According to the declaration submitted by Flaherty with his original motion, the "first recollection" he had of the lawsuit was the writ of execution; he had been traveling most of the past year; and he was "sandbagged amidst a sea of paper work regarding business and financial issues." He acknowledged his mail could have been misdelivered and stated he had tried unsuccessfully to reach the process server.[7] The trial court did not abuse its discretion in concluding this meager showing was insufficient to establish excusable neglect. (See *Sakaguchi, supra,* 173 Cal.App.4th at pp. 861-862.)

The same lack of competent evidence undermined Flaherty's request for equitable relief. "[A] trial court may . . . vacate a default on equitable grounds even if statutory relief is unavailable" (*Rappleyea, supra,* 8 Cal.4th at p. 981), but Flaherty bore the burden of proving he was entitled to that relief. (See *Sakaguchi, supra,* 173 Cal.App.4th at p. 862.) Relief from a default judgment based on extrinsic mistake requires a

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[7] In support of his claim the process server, Paul Mason, lied and did not actually serve Flaherty at his home, Flaherty submitted in this Court a request for judicial notice of pages printed from the Internet relating to allegations of fraud against Mason, as well as various court and administrative filings in unrelated cases. These documents and their contents are not properly the subject of judicial notice under Evidence Code sections 452 and 453. Flaherty's request is denied.

defendant to show he or she had a meritorious case; articulate a satisfactory excuse for not defending the original action and demonstrate diligence in seeking to set aside the default once discovered. (*Rappelyea*, at p. 982.) Again, Flaherty's failure to submit competent evidence satisfying this "stringent three-part formula" (*ibid*.) doomed his request for equitable relief.

Finally, Flaherty's motion for reconsideration under section 1008 lacked merit. "Section 1008 . . . allows the trial court to reconsider and modify, amend, or revoke its prior order when the moving party shows a different state of facts exists, or when the court determines that there has been a change of law that warrants reconsideration on its own motion."[8] (*Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 735.) If the reconsideration motion presents new or different facts, the moving party must provide the trial court with a satisfactory explanation as to why he or she failed to produce the evidence at an earlier time. (*Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1457 ["The party seeking reconsideration must provide not just new evidence or different facts, but a satisfactory explanation for the failure to produce it at an earlier time"]; accord, *Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1342.) Flaherty contends his discovery of the voicemail from the process server justified reconsideration of the motion. However, the message had been left on Flaherty's answering machine before the first hearing and could have been discovered and presented with the original motion with reasonable diligence. (See *New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212-213 ["[t]he burden under section 1008 is comparable to that of a party seeking a new trial on the ground of newly discovered evidence: the information must be such that the moving

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[8] Section 1008, subdivision (a), provides: "When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown."

party could not, with reasonable diligence, have discovered or produced it at the trial"]; see also *Jade K. v. Viguri* (1989) 210 Cal.App.3d 1459, 1464, 1467 [affirming denial of a motion for reconsideration when moving party made no showing the purported new evidence could not have been discovered before the original hearing with the exercise of reasonable diligence].) Even if the court had been inclined to reconsider its previous ruling, moreover, Flaherty's submission was again deficient, failing to attach the required responsive pleading and relying on inadmissible hearsay that was inadequate to rebut the presumption of service under section 473, subdivision (d), or establish excusable neglect under section 473.5. Accordingly, the trial court did not err in denying the motion for reconsideration.

DISPOSITION

The judgment is affirmed. Because no respondent's brief was filed, the parties are to bear their own costs.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.